UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

OLYMPIA HEALTHCARE LLC d/b/a
OLYMPIA MEDICAL CENTER.
Employer,[1]

and Case Nos. 31-RC-8773

NATIONAL UNION OF HEALTHCARE WORKERS,
Petitioner,

and

SEIU-UHW-WEST,
Intervenor.

DECISION AND DIRECTION OF ELECTION

On September 24, 2009, the National Union of Healthcare Workers (NUHW or Petitioner), filed petition 31-RC-8773 under Section 9(c) of the National Labor Relations Act, as amended, seeking to represent a unit composed of service, maintenance, technical, skilled maintenance, business office clerical and professional employees employed by Olympic Healthcare LLC d/b/a Olympia Medical Center (Olympia or Employer) at its hospital facility (Facility) located at 5900 W. Olympic Blvd., Los Angeles, CA 92843. Service Employees International Union-United Healthcare Workers-West (SEIU-UHW-West or Intervenor) has been the recognized collective bargaining representative of Olympia's employees in the petitioned-for unit.

On March 12 and March 15, 2010, an initial hearing was held on the referenced petition.

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[1] The name of the Employer appears in the caption as amended at the initial hearing.

On or about June 21, 2010, the Employer filed a motion with the Regional Director requesting that the record be reopened. On July 22, 2010, the record was reopened and a hearing ("reopened hearing") was held.

The following two issues were presented at the initial hearing:

1) Whether the petitioned-for unit constitutes an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act; and

2) Whether the following seven named classifications currently represented by Intervenor are supervisory within the meaning of Section 2(11) of the Act and should be excluded from the unit: Lead Admitting Representative; Lead Emergency Department Representative; Clinical Lab Scientist Coordinator; Microbiology Coordinator; Lead Lab Assistant; Radiology Tech Student Coordinator; and Pharmacy Tech Coordinator.[2]

The issue presented at the reopened hearing was:[3]

3) Whether professional employees should be allowed to vote as to inclusion in the petitioned-for unit, which is a combined unit with nonprofessional employees ("*Sonotone* election").

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[2] The Employer initially designated six classifications, not including Microbiology Coordinator. The Employer grouped the person currently in the Microbiology Coordinator position in the Clinical Laboratory Scientist Coordinator classification, and alleges that he is a supervisor under 2(11) of the Act. However, the evidence presented at the hearing established that he is a *Microbiology Coordinator*, not a Clinical Laboratory Scientist Coordinator. Transcript, 193:10-11; Employer's Exhibit 3. Therefore, to be consistent with the evidence presented in the hearing, I am referring to seven classifications instead of six.

[3] The Employer's motion requesting that the record be reopened listed three issues: 1) separate units for professionals and nonprofessionals; 2) inclusion in the professional unit of physical therapists, occupational therapists, and speech therapists; and 3) supervisory status of lead cook and inventory coordinator. Board Exhibit 1(k). *See also*, Board Exhibit 1(l). With respect to the second issue listed by the Employer, at the reopened hearing, the Employer, Petitioner and Intervenor (collectively referred to as the "parties"), stipulated to the classifications that would comprise the professional unit. With respect to the third issue, no evidence was adduced at the reopened hearing by any of the parties concerning this issue. Further, at the close of the reopened hearing, the hearing officer asked the parties if there were any other positions or issues. In response, the Employer stated, "No." Moreover, the issue was not addressed in the Employer's supplemental post-hearing brief dated July 29, 2010.

It is the Employer's and Petitioner's position that the unit the Petitioner seeks to represent is an appropriate unit. It is the Intervenor's position that the existing unit is inappropriate due to changes that have occurred since the signing of the existing collective-bargaining agreement (CBA) that have resulted in a lack of community of interest amongst employees. The Intervenor asserts that the existing unit should be split into the following four units, which are presumptively appropriate for the health care industry:

1) business office clerical employees;

2) professional employees;

3) service employees; and

4) technical employees.

The Employer also contends that the seven disputed classifications currently represented by the Intervenor are supervisory and should be excluded from the unit. It is the position of both the Petitioner and Intervenor that the seven disputed classifications should be included in the petitioned for bargaining unit.

Both the Petitioner and Employer agree that there should be a *Sonotone* election.[4] The Intervenor takes the position that it is appropriate for the Board to decide whether it is appropriate to change the unit *or* to have a *Sonotone* election.

For the reasons set forth in Section **V** below, I conclude the following:

1) The petitioned-for unit is an appropriate unit;[5]

2) The seven classifications in dispute are not supervisory within the meaning of Section 2(11) of the Act and I will include the classifications in the unit; and

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[4] At the hearing, the Petitioner originally took the position that there should *not* be a *Sonotone* election.. However, in its post-hearing supplemental brief dated July 29, 2010, the Petitioner changed its position, agreeing with the Employer that there should be a *Sonotone* election.

[5] Although the petitioned-for unit is an appropriate unit, as discussed below, the professional employees will need to vote as to their inclusion in the petitioned-for unit.

3) Pursuant to Section 9(b)(1), a *Sonotone* election will be held in order to ascertain the desire of the professional employees as to inclusion in the petitioned-for unit with nonprofessional employees.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Upon the entire record in this proceeding, I find:

I. **HEARING OFFICER RULINGS:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

II. **JURISDICTION:** The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.[6]

III. **LABOR ORGANIZATION**: The parties stipulated and I find that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act and they both claim to represent certain employees of the Employer.

IV. **QUESTION CONCERNING COMMERCE:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.[7]

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[6] The Employer, Olympia Healthcare LLC d/b/a Olympia Medical Center, is a California limited liability company with a place of business located in Los Angeles, California, where it is engaged in the operation of an acute care hospital. Within the past twelve months, a representative period, the Employer's gross revenues exceeded $250,000, and during this same period of time the Employer purchased and received goods and supplies valued in excess of $5,000 directly from enterprises located outside the state of California.

[7] The parties stipulated and I find there is no contract or any other bar that would preclude the processing of this petition.

V. **APPROPRIATE UNIT:** Based on the following, the record as a whole, and the mandate of Section 9(b)(1), I find that the seven classifications in dispute are not supervisory within the meaning of the Act, as amended and should be included in the bargaining unit, and that it is necessary to ascertain the desires of the professional employees as to inclusion in the unit with the nonprofessional employees. Accordingly, I shall direct separate elections in the following voting groups:

Group A: All full-time, regular part-time, and per diem service, maintenance, technical, skilled maintenance, and business office clerical employees employed by the Employer at its facility located at 5900 W. Olympic Blvd., Los Angeles, CA 92843; excluding professional employees, all other employees, confidential employees, guards and supervisors as defined in the Act.

Group B: All full-time, regular part-time, and per diem service, professional employees (including Clinical Lab Scientist, Clinical Pharmacist, Dietician, Occupational Therapist, Physical Therapist, Social Worker BSW, Social Worker LCSW, Social Worker MSW, Speech Pathologist, Microbiology Coordinator, and Clinical Lab Coordinator) employed by the Employer at its facility located at 5900 W. Olympic Blvd., Los Angeles, CA 92843; excluding RNs, Physicians, maintenance employees, office clericals employees, all other employees, confidential employees, guards and supervisors as defined in the Act.

The nonprofessional employees in voting group A will vote as to whether or not they desire to be represented for collective bargaining purposes by NUHW, SEIU-UHW-West or by no labor organization.

The professional employees in voting group B will be asked two questions on their ballot: (1) Do you desire to be included in a single unit with the nonprofessional employees for purposes of collective bargaining? (2) Do you desire to be represented for purposes of collective bargaining by NUHW, SEIU-UHW-West, or by no labor organization?

If a majority of the professional employees in voting group B vote 'yes' to the first question, indicating their wish to be included in a unit with nonprofessional employees, they will be so included. Their votes on the second question will then be counted together with the votes of the nonprofessional employees in voting group A to decide which representative, if either, has been selected as representative for the combined unit. If, on the other hand, a majority of the professional employees in voting group B vote against inclusion, they will not be included with the nonprofessional employees. Their votes on the second question will then be counted separately to decide which representative, if either, they want to represent them in a separate professional unit.

The final unit determinations, then, are based, in part, upon the results of the election among the professional employees. However, consistent with mandate of Section 9(b)(1) of the Act, I now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees in voting group B vote for inclusion in the unit with nonprofessional employees, I find that the following employees will constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time, regular part-time, and per diem service, maintenance, technical, skilled maintenance, business office clerical, and professional employees (including Clinical Lab Scientist, Clinical Pharmacist, Dietician, Occupational Therapist, Physical Therapist, Social Worker BSW, Social Worker LCSW, Social Worker MSW, Speech Pathologist, Microbiology Coordinator, and Clinical Lab Coordinator) employed by the Employer at its facility located at 5900 W. Olympic Blvd., Los Angeles, CA 92843.[8]

[8] The parties stipulated at the reopened hearing that the professional employees to be included in any unit appropriate should include classifications consistent with GC Memo 91-4, Section II, including Clinical Lab Scientist, Clinical Pharmacist, Dietician, Occupational Therapist, Physical Therapist, Social Worker BSW, Social Worker LCSW, Social Worker MSW and Speech Pathologist, Microbiology Coordinator and Clinical Lab Scientist Coordinator. The parties also stipulated that the last two classifications are to be included only if they are found not to be supervisory, which, as discussed below, I have found to be the case.

EXCLUDED: Physicians, RNs, all other employees, confidential employees, guards and supervisors as defined in the Act.

There are approximately 363 employees in the petitioned-for unit.[9]

2. If a majority of the professional employees in voting group B do not vote for inclusion in the unit with nonprofessional employees, I find that the following two groups of employees constitute separate bargaining units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Unit (a) All full-time, regular part-time, and per diem service, maintenance, technical, skilled maintenance, and business office clerical employees employed by the Employer at its facility located at 5900 W. Olympic Blvd., Los Angeles, CA 92843; excluding professional employees, all other employees, confidential employees, guards and supervisors as defined in the Act.
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> Unit (b) All full-time, regular part-time, and per diem service, professional employees (including Clinical Lab Scientist, Clinical Pharmacist, Dietician, Occupational Therapist, Physical Therapist, Social Worker BSW, Social Worker LCSW, Social Worker MSW, Speech Pathologist, Microbiology Coordinator, and Clinical Lab Coordinator) employed by the Employer at its facility located at 5900 W. Olympic Blvd., Los Angeles, CA 92843; excluding RNs, Physicians; maintenance employees, office clerical employees, all other employees, confidential employees, guards and supervisors as defined in the Act.

In analyzing the issues in this case, I will first provide a brief background, then specifically discuss the issues presented in the initial hearing and the *Sonotone* issue presented in the reopened hearing.

1. General Background

The Employer is an acute care hospital located in Los Angeles, California.

The Employer and Intervenor were signatories to a collective bargaining agreement (CBA) that expired on December 31, 2009. As of the date of the hearing, the Employer and Intervenor were negotiating for a successor collective bargaining agreement.

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[9] The evidence adduced only provided a total number of employees in the petitioned-for unit. No evidence was adduced as to the specific number of nonprofessional and professional employees.

In addition, as of the date of the hearing, the Intervenor had no current proposals to the Employer to have separate bargaining units; nor did the Employer have any current proposals to the Intervenor claiming any of the classifications in the existing unit were supervisory.

The Facility is open 24 hours each day. There are approximately 363 employees in the existing bargaining unit, covered by the expired CBA, who work at the Facility.[10] The shifts at the Facility vary depending on the department, which include Nursing, Perioperative Services, Cardio-Pulmonary Services, Laboratory, Materials Management, Admitting/Registration, Health Information Management, Pharmacy, Imaging Services, Plant Operations, Dietary, Quality Services, and Outpatient Programs. The seven named classifications at issue concern the following departments: Admitting/Patient Registration; Laboratory; Imaging Services; and Pharmacy.

2. Appropriate Unit

A. Facts

The first election at the Facility took place on September 23, 2004. At that time, Tenet Health Systems (Tenet) was the employer. Tenet recognized the Intervenor as the exclusive collective bargaining representative of the employees employed at the Facility in the following single bargaining unit: all full-time, regular part-time, and per-diem service, maintenance; technical; skilled maintenance; and business office clerical employees; and all full-time, part-time, and per-diem professional employees (except for RNs and Physicians).[11]

In about December 2004, Tenet sold and transferred the Facility to the Employer. The Intervenor and the Employer have negotiated collective bargaining agreements since 2004. The most recent CBA was executed in about January 2007 and expired on

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[10] Ten of the employees work in the seven classifications that are at issue.

[11] In the initial election, the non-professional and professional employees voted separately; the two units, however, were merged by agreement of the Intervenor and Tenet, the employer at the time of this agreement.

December 31, 2009. The existing bargaining unit identified in the CBA includes: all full-time, regular part-time, and per-diem service, maintenance; technical; skilled maintenance; business office clerical; and professional employees (except for RNs and Physicians). The existing bargaining unit description has not changed since 2004.[12] However, the parties stipulated and I find that since 2004, 15 new classifications have been added to the existing bargaining unit.[13]

The Intervenor asserts that the unit should be split into four units because of significant changes to the classifications in the unit. Such changes include the fact that the Facility was sold in 2004 and that 15 additional classifications have been added to the unit since the 2004 election. Another such change is the fact that now the employees have three choices, i.e. one union, two unions, or no union, instead of two choices, as in the 2004 election. The Intervenor asserts that splitting the units into four units will provide the employees in the bargaining unit with a fairer choice. The Intervenor contends that a single unit is not a fair choice because different classifications may have a differing viewpoint about certain unions and should not be affected by other classifications that do not have the same views.

B. Analysis

The Board recognizes that there is more than one way in which employees may be appropriately grouped. The Board's declared policy is to consider only whether the unit requested is *an* appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining. *Overnite Transportation,* 322 NLRB 723, (1996), *citing Black & Decker Mfg. Co.,* 147 NLRB 825, 828 (1964). A union therefore is not

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[12] At the initial hearing, the Employer's attorney stated that in the initial election in 2004 there were two bargaining units, one for the professional employees and one for the nonprofessional employees. The Employer's attorney explained that during bargaining, the two units were merged at the agreement of the Employer and Intervenor.

[13] These 15 new classifications include Lead Emergency Representative, Office Assistant, Release of Information Coordinator, Microbiology Coordinator, Occupational Therapist, Physical Therapist, Speech Pathologist, Lead Lab Assistant, Patient Aide, Radiology Tech Assistant, Case Manager LVN, Physician Liaison Tech, Certified Occupational Therapist Assistant, PT Assistant and Pharmacy Tech Coordinator. Four of these classifications are part of the seven classifications that the Employer alleges are supervisory under 2(11) of the Act. These four classifications are: Lead Emergency Representative; Microbiology Coordinator; Lead Lab Assistant; and Pharmacy Tech Coordinator.

required to request representation in the most comprehensive or largest unit of employees of an employer, unless an appropriate unit compatible with the requested unit does not exist, nor is it compelled to seek a narrower appropriate unit if a broader unit is also appropriate. *Id.*

In determining an appropriate unit in a representation case, the Board first considers the unit requested by the union (petitioned-for unit) and whether the unit is appropriate. *Overnite Transportation,* 322 NLRB 723 (1996), *citing P.J. Dick Contracting,* 290 NLRB 150, 151 (1988). It is only when the petitioned-for unit is not appropriate that the Board may consider an alternative proposal. *Id.*

In defining an appropriate unit, the Board typically focuses on whether the employees share a "community of interest." *Overnite,* 322 NLRB at 724. However, the Board usually applies the community-of-interest test only when delineating units of previously unrepresented employees, not when it is assessing historical units that have had long periods of successful bargaining. *Canal Carting,* 339 NLRB 969, (2003).

The Board is reluctant to disturb units established by collective bargaining as long as those units are not repugnant to the Act's policies. The existence of significant bargaining history weighs heavily in favor of finding that a historical unit is appropriate. *Canal Carting,* 339 NLRB at 970. The Board places a heavy evidentiary burden on the party challenging the historical unit as no longer being appropriate. *Ready Mix, Inc.,* 340 NLRB 946, 947 (2003) (the successor's changes to the administrative structure and managerial hierarchy fell short of meeting the heavy evidentiary burden where the employees were doing the same jobs in the same locations and under the same working conditions and mainly the same supervision as before the acquisition.) The Board in *Ready Mix* noted that "compelling circumstances are required to overcome the significance of bargaining history." *Id.*

With respect to acute care hospitals, the Board has set out the appropriate units in its Health Care Rule (Rule), reported at 29 C.F.R., §103.30; 284 NLRB 1580, et seq.

Under the Rule, the following units and only these units are appropriate in an acute hospital: all registered nurses; all physicians; all professionals except for registered nurses and physicians; all technical employees; all skilled maintenance employees; all business office clerical employees; all guards; and all other nonprofessional employees. The Rule provides, however, that a petitioning union can request a consolidation of two or more of the above units.

The historical unit in this matter includes only "appropriate units" for acute care hospitals as set forth by the Rule. There is no dispute that the historical unit was established by collective bargaining and is "considered an appropriate unit that is not repugnant to Board policy." The evidence in the record establishes that the inclusions in the petitioned-for unit mirror the inclusions of the existing unit, i.e. historical unit, represented by the Intervenor. Therefore, in challenging the petitioned-for unit, the Intervenor in essence is challenging the historical unit. The Intervenor, however, has failed to meet the heavy evidentiary burden of showing that the unit requested by the Petitioner is no longer appropriate.

The Intervenor contends that the historical unit is no longer appropriate because of significant changes that have occurred since the initial election. The Intervenor identified the significant changes as: 1) the change in ownership of the Facility; 2) the addition of 15 new classifications to the existing unit; and 3) the fact that bargaining unit now has three choices instead of two choices as in the 2004 election. However, these changes identified by the Intervenor do not meet the evidentiary burden of showing the historical unit as no longer appropriate. The record establishes that the change in ownership of the Facility took place in 2004, and that the Employer and Intervenor have subsequently negotiated collective bargaining agreements without a change to the historical unit, reinforcing the fact that the historical unit was an "appropriate unit" despite the change in ownership. Moreover, there is no evidence that the change in ownership had an impact on employee jobs, working conditions, or supervision. *Ready Mix,* 340 NLRB at 947.

Further, the Intervenor has not established how the addition of 15 new classifications is a "significant change." According to the Intervenor's Exhibit I, there are a total of 96 existing classifications in the unit. The addition of 15 new classifications represents approximately 15% of the total classifications. The record lacks any evidence of how the 15 new classifications have altered the community of interest of the employees or how these new classifications necessitate breaking the unit up into four separate units.

Finally, the Intervenor has adduced neither evidence nor basis under Board law to establish why having a single unit would be an unfair situation.

Accordingly, because the Intervenor has failed to meet its evidentiary burden by establishing that the historical unit is no longer appropriate, I find that the petitioned-for unit, i.e. the historical unit, is appropriate. In addition, because I find that the petitioned-for unit is appropriate, it is unnecessary for me to consider the alternative proposal. *Overnite Transportation,* 322 NLRB at 723.

Notwithstanding that the petitioned-for unit may be an appropriate unit, pursuant to Section 9(b)(1) of the Act, the professional employees will need to vote on whether they wanted to be included in the petitioned-for unit.

3. Supervisory Classification

A. Facts

The following four departments at the Facility are relevant to the analysis of the seven classifications at issue: Admitting/Patient Registration Department; Laboratory Department; Imaging Services – Radiology; and Pharmacy.

During the hearing, the Employer introduced evidence regarding the supervisory authority of the seven classifications. The Employer contends, and the Petitioner and Intervenor dispute, that the following seven classifications are supervisory within the meaning of the Act:

1) Lead Admitting Representative (LAR)

2) Lead Emergency Department Registration (LEDR)

3) Clinical Laboratory Scientist Coordinator (CLS Coordinator)

4) Microbiology Coordinator

5) Lead Laboratory Assistant (LLA)

6) Radiology Tech Student Coordinator (RTS Coordinator)

7) Pharmacy Tech Coordinator (PT Coordinator)

1. Admitting/Patient Registration (Lead Admitting Representative and Lead Emergency Department Registration)

The Admitting Department covers both general admitting as well as emergency registration. General admitting is open from 6:00 AM to 7:00 PM. Emergency registration operates 24 hours, 7 days a week.

The Employer contends, and the Petitioner and Intervenor dispute, that the following two classifications in the Admitting Department are supervisory within the meaning of the Act: Lead Admitting Representative (LAR) and Lead Emergency Department Registration Representative (LEDR), also collectively referred to as "Admitting Leads." The Admitting Leads are regularly scheduled from 7:00 AM to 3:30 PM, Monday through Friday. The LEDR also works the night and weekend shift as part of her regular shift, since emergency registration operates 24 hours, 7 days a week. Both report directly to the Admitting Supervisor, who also works from 7:00 AM to 3:30 PM, Monday through Friday.[14] The Admitting Director "oversees admitting and emergency registration" and the Admitting Supervisor reports directly to her. Both Admitting Leads are hourly paid employees; the Admitting Supervisor's pay is salaried.

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[14] The parties agreed that the Admitting Supervisor exercises supervisory authority within the meaning of §2(11).

a. Lead Admitting Representative

The Admitting Supervisor "oversees" the daily operations of the department. The evidence establishes that the LAR "leads" 12 admitting representatives, who are also directly supervised by the Admitting Supervisor. The Employer asserts that when the Admitting Supervisor and the Admitting Director attend management meetings, the LAR takes on the duties of "running the department" for a few hours.

The Employer contends that the LAR "supervises the day-to-day operation of the admitting department." In particular, the LAR is responsible for putting together the schedule for the admitting staff. However, the scheduling process is voluntary and if there are any scheduling changes, the employees will work it out as a team. If an employee is unable to come into work as scheduled, the employee would work it out with the other employees. When employees submit time off requests, the LAR will schedule the time off according to "the rules of labor." However, the actual approval or denial of time off requests is signed by either the Admitting Director or the Admitting Supervisor.

The Employer asserts that the LAR is responsible for the orientation and training of new employees. The orientation involves approximately one week of training before the new employees are allowed to work on their own. The LAR follows an orientation checklist to ensure the new employees have acquired the requisite basic skills they need before being released to work on their own. The current LAR is a trainer because of his experience: he has been working in the department for seven years. The LAR also performs compliance work; he is in charge of Kronos, the hospital's time keeping system, and he verifies the final payroll documentation to make sure all the work hours are accounted for and that the proper paperwork is submitted to the payroll department. However, the LAR cannot correct an error on Kronos without the employee's consent.

The LAR is involved in the hiring process by participating in the interviews with the Admitting Director and the Admitting Supervisor. His role in the interviews is to ask candidates scenario type questions.

The LAR also provides monthly quality assurance reports to the Admitting Director and the Admitting Supervisor, which are employee report cards concerning the performance of the admitting staff. The LAR rates the employee's performance as low, medium or high. The Admitting Director and Supervisor take that information as a basis for their written evaluation. The report card can lead to discipline, which is imposed only after independent intervention or investigation by the Admitting Director or Admitting Supervisor.

In addition, the LAR provides reports to the Admitting Director and the Admitting Supervisor documenting various infractions by the admitting staff, such as missed swipes.[15] However, the Admitting Director and the Admitting Supervisor are responsible for providing employee discipline, which the Admitting Director performs after an independent investigation. Likewise, suspension or discharge decisions are made only by the Admitting Director and the Admitting Supervisor.

b. Lead Emergency Department Registration Representative (LEDR)

In emergency registration, the LEDR is the lead to 10 admitting staff. The Admitting Supervisor is responsible for "overseeing" the 10 admitting staff and directly supervises them. The LEDR's duties mirror the LAR's duties; they perform similar functions for scheduling, orientation and training, quality assurance, and evaluation. Neither can issue discipline; any reported infractions or poor employee performances are independently investigated by the Admitting Director before she imposes discipline.

In addition, the LEDR position description provides that the LEDR is responsible for "ensuring that all staff provide excellent customer service" in accordance with the Employer's customer service policy, AIDET.[16] The Employer asserts that the LEDR

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[15] Eight missed swipes starts the disciplinary process. The LAR must report any employee who has eight missed swipes within a 12 month period.

[16] AIDET stands for acknowledge, introduce, duration of time, explain how long waiting process and thanking.

"oversees" whether the staff is in compliance with AIDET and communicates this information back to the Admitting Director and the Admitting Supervisor.

2. Laboratory (Clinical Laboratory Coordinators, Microbiology Coordinator and Lead Lab Assistant)

The Facility's Laboratory department is divided into four sections: Biochemistry; Blood Bank; Hematology; and Microbiology. The Laboratory operates 24 hours a day, 7 days a week. The Administrative Director of Ancillary Services (Administrative Director) "oversees" the Laboratory (in addition to a number of other departments). The Laboratory employs approximately 23 clinical laboratory scientists (CLS), including four CLS Coordinators and a Microbiology Coordinator (collectively referred to as "Lab Coordinators"), one Lead Lab Assistant, and 16 lab assistants. With the exception of the Lab Coordinators and two CLS who are assigned to Microbiology, all CLS rotate through three of the sections: Biochemistry; Blood Bank; and Hematology. All the Lab Coordinators are hourly paid employees.

The Employer contends, and the Petitioner and Intervenor dispute, that CLS Coordinators, the Microbiology Coordinator, and the Lead Lab Assistant are supervisors within the meaning of the Act.

a. Lab Coordinators

Because the lab manager position was eliminated sometime in summer 2009, the Lab Coordinators report directly to the Administrative Director. There are a total of five Lab Coordinators: one Lab Coordinator for each of section of the Laboratory and one for the graveyard shift (graveyard shift Lab Coordinator). According to the Employer, the Lab Coordinators are responsible for "overseeing" the CLS assigned to their respective sections. Each CLS Coordinator for Biochemistry, Blood Bank, and Hematology "oversees" one CLS. The Microbiology Coordinator "oversees" the two CLS who are permanently assigned to Microbiology. Because Microbiology is "a little bit more technical

than the other areas" and requires experience that is more specific, there are two people permanently assigned to Microbiology. The graveyard shift Lab Coordinator works in all the sections except for Microbiology and does not "oversee" anyone else. He is the only scientist on his shift. (On occasion, he may work the second shift at which time he may "direct" activities of the CLS, assuming he is the coordinator on duty.)

The Administrative Director interacts on a daily basis with all the sections and spends on average an hour per day with each section, except for Hematology, where he only spends approximately 10 or 15 minutes.[17]

All the CLS Coordinators spend approximately 50 percent of their time performing technical work in the laboratory and – according to the Administrative Director – the other 50 percent on "management." The Microbiology Coordinator, however, only "oversees Microbiology" and does not engage in any technical laboratory work.

All the Lab Coordinators except the graveyard CLS Coordinator provide orientation and training for new employees by going through an orientation checklist to ensure that the new employee is proficient in various functions. The Lab Coordinators also "supervise the assays," meaning they are responsible for the management of technical equipment, the quality control of this equipment and the training of staff to run this equipment. The Employer asserts that part of "supervising assays" also involves "directing the activities" of the CLS in that section. In addition, the Lab Coordinators are responsible for monitoring the quality control systems on a daily basis and for examining results to ensure that any testing that was performed is accurate. The Lab Coordinators generate quality control statistics for the Administrative Director's review, although the Administrative Director can monitor performance at any time, since there are computer systems in place that enable him to look at quality control data and "see what's happening on the shift."

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[17] According to the Administrative Director, the Lab Coordinator in Hematology is "pretty independent" because "he has worked there for 30 some years."

The Employer has established guidelines for the Lab Coordinators that specify when they should bring an issue to the Administrative Director's attention. As part of the quality control system, the Lab Coordinators, with the exception of the graveyard shift Lab Coordinator,[18] evaluate the employees by documenting technical or clerical errors in an internal documentation system that the Administrative Director reviews. The Lab Coordinators are reporting the facts when documenting the errors; they provide no disciplinary recommendation. While the Lab Coordinators may bring problems to the Administrative Director's attention, the Administrative Director uses his own judgment to determine what kind of discipline to pursue; the Lab Coordinators do not decide the type of discipline, and the Administrative Director always performs his own independent investigation before imposing discipline.

Annual evaluations are given every December. The Administrative Director meets with the Lab Coordinators to obtain their input for the performance appraisals of the CLS and he generally follows the recommendation of the Lab Coordinators, but he also notes that he is "pretty much aware of how the employees are functioning anyway" because "there's been [a] dialog throughout the year." Only the Administrative Director has the final authority to sign off on performance evaluations and he always meets with the employees involved before signing off on the evaluations.

The CLS Coordinator for Hematology has the additional responsibility of scheduling all the CLS except for the two in Microbiology.[19] The Employer asserts that the CLS Coordinator determines how to schedule staff based on his familiarity with their competencies since a scientist may not be able to work in every division. (In the Microbiology department, the Microbiology Coordinator is responsible for scheduling the two permanently assigned staff).

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[18] On occasion, the graveyard shift Lab Coordinator fills in for the second shift and assuming he is the coordinator on duty, he would have similar responsibilities over CLS on the shift.

[19] The Microbiology Coordinator is responsible for scheduling the two CLS who are permanently assigned to Microbiology.

b. Lead Lab Assistant (LLA)

The Lead Lab Assistant (LLA) reports directly to the Administrative Director.[20] According to the Administrative Director, the LLA "directs" the activities of the 16 laboratory assistants.

The LLA works from 5:00 AM to 2:30 PM, five days a week; the days will vary since he works every other weekend. During his shift, he is the lead for generally two laboratory assistants;[21] he is an hourly paid employee.

Similar to the Lab Coordinators, the LLA spends part of his time performing laboratory work and the balance of his time "overseeing the daily operations" of the laboratory assistant section. The LLA position description provides that the LEDR "oversees and monitors workload for effective use of staff." The Administrative Director explained that the LLA "shifts resources to where the heaviest workload is to expedite whatever needs to be done." The LLA is also responsible for scheduling the 16 laboratory assistants, which is done pursuant to the CBA. Article 11 of the CBA addresses scheduling, including hours of work, scheduled days off, meal periods, overtime, weekend hours, holiday and vacation scheduling. The LLA has the authority to approve or deny vacation in accordance with the CBA. However if there is a dispute, the employee can appeal to the Administrative Director.

The LLA's responsibilities mirror those of the Lab Coordinators with respect to training and orientation of the laboratory assistants, quality control, and evaluations. Like the Lab Coordinators, the LLA also provides documentation on technical or clinical errors from an employee, but he cannot administer discipline.

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[20] There is no supervisory level between the LLA and the Director.

[21] He also has some interaction with the laboratory assistant from the graveyard shift and an assistant from the swing shift because there is a 30-minute overlap between his shift and their shifts.

3. Imaging Services (Radiology Tech Student Coordinator)

The Administrative Director also "oversees" the Radiology Department, which operates 24 hours, 7 days per week and contains approximately 25-27 employees, including the Radiology Tech Student (RTS) Coordinator, and about eight student interns (there are only two to three students at a time in a rotation). The RTS Coordinator is responsible for coordinating the students, who are not employees of the hospital, but unpaid interns who receive only academic credit for their work. The students generally assist in performing routine x-rays.

The Employer contends, and the Petitioner and Intervenor dispute, that the RTS Coordinator is a supervisor within the meaning of the Act.

The current RTS Coordinator has been coordinating students since 2005, and according to the Administrative Director, his duties have not changed significantly. His duties include training students to ensure compliance with the orientation competency checklist, scheduling the students, and coordinating their administrative paperwork such as background checks and health care clearance. He is also responsible for evaluating the students to make sure they are performing their duties competently and meeting their minimum requirements. If there is an issue with student performance that may result in possible disciplinary action, the RTS Coordinator will contact the Administrative Director to discuss the issue.

On occasion, a student intern may be hired to a position if one is available. According to the Administrative Director, if there is a position available they will "usually talk to the better students to see if they're interested in the position."[22] The RTS Coordinator's involvement in the process would be to provide the initial recommendation. The Employer provided testimony that the current RTS Coordinator has made a rec-

[22] The Director testified that "we would talk to the better students..." but did not specify who "we" was.

ommendation in the past and that the Administrative Director followed the recommendation.[23]

4. Pharmacy (Pharmacy Tech Coordinator)

The Pharmacy operates from 7:00 AM to 11:00 PM, seven days a week. The Director of Pharmacy is also the Pharmacist in Charge in accordance with California law. The Pharmacy Director described the following chain of command. Directly below the Pharmacy Director is the Pharmacy Manager, who is responsible for coordinating the pharmacists and the pharmacy techs. (State law mandates that a pharmacist is responsible for everything being conducted in the pharmacy.) Below the Pharmacy Manager is the Clinical Coordinator, who is involved with the clinical operations of the pharmacy department. Finally, the Pharmacy Tech Coordinator (PT Coordinator), is the "fourth in command" and is in charge of coordinating the 12 technicians. The PT Coordinator's work hours are 7:30 AM to 4:30 PM, Monday though Friday. There are typically four to five technicians with her during her shift, and she overlaps with the two technicians from the evening shift. The PT Coordinator remains in the Pharmacy, while the technicians work in other areas in the hospital. The technicians spend a total of about three or four hours each day at the Pharmacy to restock their medication. According to the Pharmacy Director, it is a small pharmacy operation.

The Employer contends, and the Petitioner and Intervenor dispute, that the PT Coordinator is a supervisor within the meaning of the Act.

The PT Coordinator position is a position recreated [24] within the last two months and is an hourly paid position. Before her promotion to PT Coordinator, the current PT Coordinator was the Pharmacy's buyer. The current PT Coordinator stipulated as a condition of her promotion that she continue acting as the buyer for the Pharmacy. According

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[23] Besides the aforementioned, the Employer advanced no other evidence concerning recommendation to hire.

[24] The position previously existed but had become dormant for some time.

to the Pharmacy Director, a key component of the PT Coordinator's duties is acting as the Pharmacy's buyer. The PT Coordinator spends a couple of hours a day in her role as a buyer and provides the Pharmacy Director with day-to-day reports of the Pharmacy's year-to-date purchases.

The PT Coordinator is responsible for the orientation and training of new technicians to ensure compliance with the departmental and hospital orientation checklist. She is responsible for ensuring that the new technicians have the proper knowledge base and she will work with the Pharmacy Director and the other pharmacists to retrain the technicians in any deficient areas. The PT Coordinator is also responsible for scheduling the technicians, and tries to accommodate their requests. However, the technicians are encouraged to work it out amongst themselves if there are issues with scheduling. The technicians are also free to take their own breaks as necessary.

Although the PT Coordinator has not, as of the hearing's date, participated in hiring, the Employer asserts that the PT Coordinator will have a role in helping the Pharmacy Director in the screening process, and if necessary or appropriate, she will also participate in job interviews. According to the Pharmacy Director, the Pharmacy typically hires people the staff have worked with in the past at other facilities or students that have come to work at the Pharmacy.

The Employer asserts that the PT Coordinator plays an "active role" in providing input on the performance of employees (including providing positive comments on a number of individuals and identifying areas for improvements in others). For annual reviews, the Director requests input from the Pharmacy Manager, the Clinical Manager, and the PT Coordinator. The Employer contends that the PT Coordinator is part of the administrative team. With respect to discipline, the Pharmacy Director is the sole disciplinarian. The Pharmacy Director takes care of that responsibility himself, including conducting his own independent investigation.

According to the Pharmacy Director, "pretty much everybody knows their assigned roles" and he looks to the PT Coordinator to "ensure the smooth flow of the department." The PT Coordinator is the "coordinator behind the scenes, making sure it's an efficient operation and fair environment for all involved."

B. Analysis

Section 2(11) of the Act defines the term "supervisor" as:

> any individual having the authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The criteria listed in Section 2(11) are in the disjunctive so that the exercise of any one of the indicia listed in Section 2(11) may warrant a finding of supervisory status; however, Section 2(11) also contains the "conjunctive requirement that the power be exercised with 'independent judgment,' rather than in a 'routine' or 'clerical' fashion." *Chevron U.S.A.*, 309 NLRB 59, 61 (1992).[25]

The party asserting supervisory status has the burden of proving its assertion by the preponderance of the evidence. *Oakwood Healthcare,* 348 NLRB 686, 694 (2006). "[P]urely conclusory" evidence is not sufficient to establish supervisor status; a party must present evidence that the employee "actually possesses" the Section 2(11) authority at issue. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). When evidence of any of the Section 2(11) indicia is established, the analysis proceeds to determining whether the individual exercises that authority using independent judgment. *Oakwood*

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[25] The United States Supreme Court described the conjunctive requirement of Section 2(11) with three prongs: 1) the employee has the authority to engage in any one of the twelve Section 2(11) criteria; 2) the exercise of such authority requires the use of independent judgment; and 3) the employee holds the authority in the interest of the employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 US 706, 712-13 (2001).

Healthcare, 348 NLRB at 692. Any lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409, 1409 (2000).

Applying the criteria set forth in Section 2(11) and relevant Board law, I find that, as explained below, the Employer has failed to establish that any of the seven disputed classifications possess true indicia of supervisory authority.

1. Admitting Leads

The record established that the Admitting Supervisor also oversees the same admitting representatives that the Admitting Leads assertedly supervise.

The Employer contends that the Admitting Leads possess supervisory authority because they schedule the staff using independent judgment. However, such "conclusionary statements made by witnesses in their testimony, without supporting evidence, do not establish supervisory authority." *Golden Crest Healthcare,* 348 NLRB at 731 (2006).

In *Oakwood Healthcare,* the Board interpreted the authority to "assign" to mean the act of "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee . . . ." *Oakwood Healthcare*, 348 NLRB at 689. The party seeking to establish supervisory authority must show that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to request that a certain action be taken. *Golden Crest Healthcare,* 348 NLRB at 729. *See also Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459 (2001) (putative supervisors found not to exercise supervisory authority where they had no authority to require off-duty employees to fill a particular shift).

The record demonstrates that scheduling is a voluntary process where staff employees are encouraged to work out scheduling issues among themselves; the Admitting Leads have no authority to sign off on changes, and there is no evidence that the

Admitting Leads can require the admitting representatives to fill an open shift. Accordingly, the Admitting Leads are performing a "clerical" and "routine" function in putting together the schedules according to time off and vacation requests.

The Employer argues that the Admitting Leads exercise supervisory authority by training and providing orientation to new admitted representatives, and that LEDR, in particular, exercises supervisory authority because she is "responsible for ensuring all staff provide excellent customer service." However, the Employer has adduced no evidence that the Admitting Leads "responsibly direct" the admitting representatives.

The authority to "responsibly to direct" employees is not limited to department heads. It is exercised by persons who have rank and file employees under them and who decide what job shall be undertaken next or who shall do it, provided the direction is "responsible." *Oakwood Healthcare*, 348 NLRB at 691. Direction is "responsible" if the person performing the oversight is accountable for others' performance of the tasks, such that some adverse consequences may befall the one providing the oversight if the tasks are not performed properly. *Oakwood Healthcare*, 348 NLRB at 692. Further, to establish accountability for purposes of responsible direction, "it must be shown that the employer delegated the work and authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.*

Here, there is no evidence establishing that the Admitting Leads are held accountable for the performance of the new admitting representatives or that the LEDR is held accountable for the admitting representatives' adherence to AIDET, the customer service policy.

The Employer also takes the position that the Admitting Leads are supervisors because they are involved in hiring and evaluating process.

The power to effectively recommend a hire, as used in Section 2(11), contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. *USF Reddaway*, 349 NLRB 329 (2007), *citing J. C. Penny Corp.*, 347 NLRB 127, 129 (2006) (assistant foreman who interviewed applicants and advised management of the experience of at least one of them did not make hiring decisions or effective recommendations to hire, as management also interviewed all applicants and had final hiring authority). See, *The Door*, 297 NLRB 601, 601-602 (1990) (finding that an employee lacked authority to effectively recommend hire where his role in the hiring process was limited to screening resumes, making recommendations with respect to technical qualifications, and participating, along with others, in applicant interviews). *Cf., Fred Meyer Alaska, Inc.,* 334 NLRB 645, 649 (2001) (individuals with authority to interview applicants on their own and who exercised authority to recommend hire were supervisors).

The Employer has adduced no evidence that the Admitting Leads have authority to hire. Similar to the situation in *The Door,* the record testimony establishes that the Admitting Leads participate in the interviews, along with the Admitting Director and the Admitting Supervisor, by asking scenario type questions. The record lacks evidence that the Admitting Leads have the authority to interview applicants on their own. Further, only the Admitting Supervisor and the Admitting Director have the final authority to hire.

The Employer has adduced no evidence that the Admitting Leads "effectively recommend discipline." The Board has held that the authority to "evaluate" is not one of the indicia of supervisor status set out in Section 2(11) of the act. Where oral or written notifications simply bring to an employer's attention substandard performance by employees without recommendation for future discipline, the individual is merely performing a reporting function, which is not supervisory authority. *Willamette Industries,* 336 NLRB 743, 744 (2001), *citing, Elmhurst Extended Care Facilities,* 329 NLRB 535, 536 (1999) (holding that the individuals did not exercise supervisory authority in reporting

employees infractions to management, who made the final decision as to whether employee discipline was warranted).

Here, the record demonstrates that the Admitting Leads are merely providing a reporting function by providing employee report cards to the Admitting Director and the Admitting Supervisor. *Willamette Industries,* 336 NLRB at 744. These report cards themselves do not result in disciplinary actions. On occasion, the Admitting Leads will submit infractions by the admitting staff to the Admitting Director and the Admitting Supervisor. The Admitting Director and the Admitting Supervisor, however, alone are responsible for providing employee discipline; they make the final determination whether discipline is warranted. The Employer has not adduced evidence that the infractions submitted to Admitting Director and Supervisor are more than "clerical" in nature. The Admitting Director even noted that the Admitting Leads have guidelines of when they must report infractions, specifically noting that they *must* report eight missed swipes. Similarly, with respect to AIDET compliance, the record establishes that the LEDR is merely reporting to the Admitting Director and the Admitting Supervisor whether the representatives are in compliance with AIDET. The record herein fails to establish that the Admitting Leads exercise the requisite independent judgment in performing their reporting function as to be deemed as supervisors within the meaning of Section 2(11).

The Employer has failed to adduce evidence sufficient to establish that the Admitting Leads, the LAR and LEDR, exercise or possess any of the 12 indicia of supervisory authority. Accordingly, I find that the LAR and the LEDR are not supervisors within the meaning of the Act and that they should be included in the bargaining unit.

2. CLS Coordinators and Microbiology Coordinator (also collectively referred to as "Lab Coordinators")

The Employer contends, and the Petitioner and Intervenor dispute, that the Lab Coordinators are supervisors within the meaning of the Act. The Employer argues that the Lab Coordinators are supervisors because the Administrative Director confirmed in

his testimony that the Lab Coordinators perform the duties identified in the Coordinator Job description. This conclusory statement without supporting evidence will not establish supervisory authority. *Golden Crest Healthcare,* 348 NLRB at 730. See also, *Training School at Vineland*, 332 NLRB 1412, 1416 (2000) (job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight; the Board insists on evidence supporting a finding of actual as opposed to mere paper authority).

a. Graveyard Shift Coordinator

Where an individual is engaged part of the time as supervisor and the rest of the time as a unit employee, the standard for supervisory determination is whether the individual spends a regular and substantial portion of his/her time performing supervisory functions. *Oakwood Healthcare*, 348 NLRB at 684. Under the Board's standard, "regular" means according to a pattern or schedule as opposed to sporadic substitution. *Id.*

The record lacks evidence establishing that the graveyard shift Coordinator exercises any of the supervisory indicia over the CLS, since he works alone. The Employer only provides conclusory statements that on occasion, when the graveyard shift Coordinator works the second shift, he "directs" the activities of the CLS. Even if, arguendo, the graveyard shift Coordinator exercised supervisory authority by directing the activities of CLS in the second shift, the record testimony does not indicate this second-shift activity was a "regular occurrence." On the contrary, the record establishes that even on the occasions he worked the second shift he would only direct activities *if* there were not another coordinator on duty. The graveyard shift Coordinator's time spent performing these - assertedly supervisory functions was therefore "sporadic substitution" and not "regular" as defined by the Board. *Oakwood Healthcare*, 348 NLRB at 684.

b. Four Remaining Lab Coordinators:

The Employer also argues that the four other Lab Coordinators have the authority to assign work, responsibly direct, discipline and effectively recommend employees.

i. Assign and Responsibly Direct

As noted, the authority to "assign" is defined as the act of "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee . . . ." *Oakwood Healthcare*, 348 NLRB at 689. See also *Armstrong Machine Co.,* 343 NLRB 1149 (2004) (work assignments based on common knowledge, present in a small workplace, of which employees have certain skills and which employees do not work together, are routine and do not demonstrate the exercise of independent judgment).

The Employer has not established that the Lab Coordinators exercise supervisory authority in assigning work. The Employer's assertion that the Lab Coordinators "direct the activities of the CLS" is conclusory and is not supported by examples of what type of work was assigned or how it was assigned.

Even if the Lab Coordinators had the authority to "assign work," the evidence does not establish that the Lab Coordinators exercised the requisite independent judgment. *Oakwood Healthcare*, 348 NLRB at 692. The record does not disclose how any of the Lab Coordinators assign work, and no evidence was adduced that they exercise any independent judgment in this capacity. The Employer here produced no evidence other than conclusory statements.[26] The evidence adduced by the Employer demonstrates that the Lab Coordinators provide training and orientation based on routine guidelines set

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[26] Ahrablou -"you know, she manages the people that are working in that section for that particular day." (Transcript 194:10-11). Chanta has "similar obligations to oversee the other workers and scientists in microbiology." (Transcript 200:16-18); he "manages those people directly in terms of their scheduling." (Transcript 202:5-6). Velasquez "schedules all the clinical lab scientists." (Transcript 202:9-10, 208:12-14).

forth in a departmental checklist; no evidence was adduced that the Lab Coordinators exercised independent judgment in performing this duty. Further, there was no evidence adduced that the Hematology Coordinator or Microbiology Coordinator exercised independent judgment in preparing employee schedules. *Dean & Deluca New York*, 338 NLRB 1046, 1048 (2003)(an individual's scheduling of employees does not necessarily establish that the individual is a statutory supervisor without evidence of independent judgment.) The evidence establishes that the Administrative Director makes the final determination if there are problems that cannot be resolved. See also *Ten Broeck Commons*, 320 NLRB 806, 810 (1996) (Charge nurses' assignment of work to certified nursing assistants (CNAs) did not require the use of independent judgment, because all the CNAs had the same skills, and were routinely rotated on a monthly basis). The record establishes that the CLS were routinely rotated through the three sections. Although the Hematology Coordinator, in making the schedules, knows the competencies of the staff, the record does not establish that he exercises independent judgment in preparing the schedule or that there is any significant difference in skill levels.

The evidence is insufficient to establish that the Lab Coordinators have the authority to "responsibly direct" the CLS. Direction is responsible if supervisors are subject to discipline, i.e. held accountable, for the performance of the employees they direct. *Oakwood Healthcare*, 348 NLRB at 692. The evidence failed to establish whether the performance of the CLS' impacted the Lab Coordinators. There is no evidence that the Lab Coordinators are held accountable for the new CLS that they train and orientate. See *Croft Metals*, 348 NLRB 717, 722 (2006) (in order to responsibly direct, the asserted supervisors must be subject to discipline or other adverse consequences because of the failure of their crews to meet production goals or because of other shortcomings of their crews).

Accordingly, I find the evidence regarding the Lab Coordinators' authority to "assign" and "direct" work was "conclusory" and insufficient to meet the Employer's burden.

ii. Effectively Recommend and Discipline

Where oral or written notifications simply bring to an employer's attention substandard performance by employees without recommendation for future discipline, the individual is merely performing a reporting function, which is not supervisory authority. *Willamette Industries,* 336 NLRB at 744 (noting evaluations that serve primarily to identify skills new employees need to improve or develop was not an effective recommendation since there was no evidence indicating what weight those recommendations carry in personnel decisions). Further, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. *Id.* In *Coventry Health Center,* 332 NLRB 52 (2000), charge nurses evaluated probationary nursing aides and numerically rated the aides on various aspects of job performance including quality, productivity, job knowledge, dependability, and adherence to policy. There was no evidence that probationary employees had been discharged or had their probation period extended as a result. The Board concluded that the nurses were not effectively recommending a reward or personnel action concerning other employees, but rather the nurses were rating the nurse aids in a manner "similar to that of the more experienced employee who conducts tests and grades the skills of new hires against recognized standards or guidelines." *Id.* at 54.

No evidence was presented that the Lab Coordinators' evaluations with respect to orientation and training, quality control statistics or performance appraisals carry any weight in personnel decisions. The Lab Coordinators deliver quality control statistics generated by the computer system, which is a routine reporting function that the Administrative Director can obtain himself. The Lab Coordinators are merely "reporting the facts" when they document technical and clerical errors. *Willamette Industries,* 336 NLRB at 744. There is no evidence that the Lab Coordinators' input in performance appraisals affects the wages and/or job status of the employees being evaluated. *Willamette Industries,* 336 NLRB at 743. Moreover, the Lab Coordinators only brought problems to

the Administrative Director's attention who then used his own judgment to determine what type of disciplinary action, if any, to pursue. *Willamette Industries,* 336 NLRB at 744. Accordingly, I conclude that the Employer has not carried its burden of showing that the Lab Coordinators "effectively recommend" discipline.

Since, as explained above, any lack of specific evidence that would support a finding of supervisory status must be construed against the Employer, as the party asserting supervisory status, I find that the Employer has not established that the Lab Coordinators are statutory supervisors; they therefore will be included in the bargaining unit. *Michigan Masonic Home*, 332 NLRB at 1409.

3. Lead Laboratory Assistant (LLA)

The Employer has adduced insufficient evidence to establish that the LLA is a supervisory position based on any of the 12 specific functions listed in Section 2(11) of the Act. Rather, the record contains conclusory assertions regarding the LLA's supervisory authority. *Golden Crest Healthcare,* 348 NLRB at 730.

The Employer contends that the LLA's supervisory authority is evidenced by his assignment of work to the lab assistants, training and orientation of the lab assistants, responsible direction of the lab assistants and his "effective recommendation" of discipline.

As noted above, the authority to "assign" is defined as the act of "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee . . . ." *Oakwood Healthcare*, 348 NLRB at 689. Further, the authority to "assign work," must be exercised with the requisite independent judgment. *Oakwood Healthcare*, 348 NLRB at 692. The mere equalization of workloads does not require the exercise of independent judgment. *Id.* at 698.

The Employer provided only conclusory statements concerning the LLA's authority to assign. In addition, no evidence was adduced on how the LLA assign work nor was any evidence adduced to indicate that he exercises any independent judgment in assigning work. On the contrary, the record established that the role the LLA played with respect to assignment was routine and did not establish an exercise of independent authority. The LLA merely "shifts resources to where the heaviest workload is to expedite whatever needs to be done." The evidence fails to establish why or how independent judgment is required or exercised. *Oakwood Healthcare*, 348 NLRB at 698.

Although the LLA is responsible for scheduling, no evidence was adduced that he exercised independent judgment in performing this function. *Dean & Deluca New York*, 338 NLRB at 1048; *Oakwood Healthcare*, 348 NLRB at 689. Rather, the evidence established that he prepared the schedule according to the CBA. Further, only the Administrative Director has the final authority to approve vacation and time off requests. Similar to the Lab Coordinators, the LLA's training responsibilities are limited to the routine guidelines set forth in an orientation checklist. Accordingly, I conclude that the Employer has not carried its burden of showing that the LLA has the authority to assign work or exercise independent judgment in doing so.

Direction is responsible if supervisors are held accountable for the performance of the employees they direct. *Oakwood Healthcare*, 348 NLRB at 692. No evidence was adduced that the LLA is subject to discipline for the shortcomings of the laboratory assistants. *Oakwood Healthcare*, 348 NLRB at 692. Therefore, I find that the LLA does not "responsibly direct" the lab assistants.

Where oral or written notifications simply bring to an employer's attention substandard performance by employees without recommendation for future discipline, the individual is merely performing a reporting function, which is not a statutory indicia of supervisory authority. *Willamette Industries,* 336 NLRB at 744. Like the Lab Coordinators, the record testimony shows that the LLA records only facts when documenting

technical and clinical errors for the Administrative Director's review. There is no evidence that these reports result in any disciplinary action. Similarly, the Employer has not established that the quality reports that the LLA generates and the input he provides in evaluations have any impact on the wages or the job status of the laboratory assistants being evaluated. *Willamette Industries,* 336 NLRB at 744. I find that the Employer has not carried its burden of showing that the LLA "effectively recommends" discipline, and has failed to carry its burden to establish that the LLA is a supervisory position; this classification therefore will be included in the bargaining unit.

4. RTS Coordinator

The Employer has failed to adduce evidence sufficient to establish that the RTS Coordinator possesses supervisory authority based on any of the 12 specific functions listed by Section 2(11) of the Act.

The Employer has not adduced evidence that these student interns are employees under Section 2(3) of the Act. Even if the student interns were considered employees under Section 2(3) of the Act, the Employer has adduced primarily conclusory assertions regarding the RTS Coordinator's supervisory authority. *Golden Crest Healthcare,* 348 NLRB at 730.

The Employer argues that the predominant authority that makes the RTS Coordinator a supervisor is his ability to "effectively recommend hire." As noted, the power to effectively recommend a hire contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. *USF Reddaway*, 349 NLRB 329 (2007).

There is insufficient evidence here to conclude that the RTS Coordinator has the authority to "effectively recommend hire." The only evidence adduced was that the RTS Coordinator made the *initial* recommendation if there were any clinical spots open. However, there is no evidence that the RTS Coordinator could interview applicants on his

own or that his recommendation was followed absent an independent interview and review of the applicant. Any lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB at 1409.

Accordingly, I find that the evidence regarding the RTS Coordinator's authority to effectively recommend hire was "purely conclusory" and insufficient to meet the Employer's burden.

I also note that the current RTS Coordinator has held this classification since 2005, his duties have not significantly changed, and the classification was previously included in the bargaining unit. Considering these facts and the Employer's failure to meet its burden concerning the RTS Coordinator's supervisory authority, I therefore will include the RTS Coordinator in the bargaining unit.

5. PT Coordinator

The Employer argues that the PT Coordinator has the authority to assign work, responsibly direct, and effectively recommend hire and discipline.

The record contains primarily conclusory evidence concerning the PT Coordinator's supervisory authority. *Golden Crest Healthcare,* 348 NLRB at 730.

The Employer contends that the PT Coordinator has the authority to hire, but the Employer failed to adduce any such evidence. As noted, the power to effectively recommend a hire contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. *USF Reddaway*, 349 NLRB 329 (2007). The record testimony establishes the PT Coordinator's role in the hiring process would only be to *assist* in the interview process, and only where necessary or appropriate. Mere participation in the hiring process is insufficient to support a finding of authority to hire. *The Door*, 297 NLRB at 601-602. Further, hiring is usually based on references from the staff or based on experience with students who have come to work at the Facility.

The Employer also contends that the PT Coordinator exercises supervisory authority because she is responsible for training, scheduling, and providing orientation for the pharmacy technicians. The authority to "assign" is defined as the act of "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee . . . ." *Oakwood Healthcare*, 348 NLRB at 689. The authority to assign must be exercised with the requisite independent judgment. *Oakwood Healthcare*, 348 NLRB at 692.

Similar to the classifications discussed above, the evidence has failed to establish that that the PT Coordinator's training and orientation functions are other than routine, since she uses departmental and hospital orientation checklists. No evidence was adduced to establish that that she exercises independent judgment in performing these duties.

The Employer takes the position that the PT Coordinator's scheduling duties demonstrate her supervisory authority. However, the party seeking to establish supervisory authority must show that the putative supervisor has the ability to *require* that a certain action be taken. *Golden Crest Healthcare,* 348 NLRB at 729. The record testimony established that her scheduling duties are nothing more than routine. No evidence was adduced that the PT Coordinator can require the technicians to work open shifts or to sign off on schedule changes. Rather, the scheduling is voluntary; if issues arise, the pharmacy technicians are encouraged to work it out themselves, even scheduling their own breaks. There is no evidence that the PT Coordinator assigns "significant overall duties" to the pharmacy technicians, or if she did, that she exercised independent judgment in exercising that authority. *Oakwood Healthcare*, 348 NLRB at 689. The record lacks any evidence of how she assigns work and how she determines what work should be assigned. In fact, the record established that "pretty much everybody knows their assigned roles," substantiating that the PT Coordinator's assignment of duties was merely routine or clerical.

Accordingly, I conclude that the evidence regarding the PT Coordinator's authority to assign work was conclusory and insufficient to meet the Employer's burden.

The Employer's conclusory assertion that the PT Coordinator is the "coordinator behind the scenes," without more, fails to establish supervisory authority. *Golden Crest Healthcare,* 348 NLRB at 730. There is no evidence of how she "coordinates" the pharmacy technicians, nor is there evidence that the PT Coordinator responsibly directs the pharmacy technicians. *Oakwood Healthcare*, 348 NLRB at 692. Direction is responsible if supervisors are subject to discipline, i.e. held accountable, for the performance of the employees they direct. *Oakwood Healthcare*, 348 NLRB at 692. The Employer has not adduced evidence that the PT Coordinator is held accountable for the pharmacy technicians' performance. On the contrary, the evidence establishes that the Pharmacy Director and the Pharmacy Manager are held accountable, since state law mandates that a pharmacist must be held accountable for the conduct in the pharmacy. Therefore, based on lack of evidence in the record concerning the PT Coordinator's authority to responsibly direct, I find that the Employer has failed to meet its burden in this regard.

Finally, the Employer argues that the PT Coordinator's input on the performance of employees demonstrates her supervisory authority. Nonetheless, as previously detailed, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. *Willamette Industries,* 336 NLRB at 744. The Employer has not adduced evidence that the PT Coordinator's input affects the pharmacy technician's wages and/or job status. Conversely, the record reveals that the PT Coordinator's input primarily served to identify skills the primary technicians needed to improve or develop. *Id.* The PT Coordinator worked with the Pharmacy Director and the other pharmacists to retrain technicians in deficient areas. The PT Coordinator has no disciplinary authority; the Pharmacy Director always conducts his own investigations. I find, therefore, that there is insufficient evidence that the PT Coordinator effectively recommends discipline and conclude that the Employer has not met its burden.

Based on the aforementioned reasons I conclude that the Employer has failed to meet its burden regarding the PT Coordinator's supervisory authority and I therefore will include the PT Coordinator position in the unit.

4. *Sonotone* Election

Section 9(b)(1) provides, in pertinent part, that the Board shall not decide that any unit is appropriate for the purposes of the collective bargaining "...if such unit includes both professional employees and employees who are not professional employees unless a majority of professional employees vote for inclusion in such unit."

Pursuant to the statutory requirement, the Board has adopted a self-determination procedure known as a *Sonotone* election whereby the ballots used for the professional employees ask two questions: (1) whether they desire to be included in a group composed of nonprofessional and professional employees; and (2) their choice with respect to the bargaining representative. *Sonotone Corp.*, 90 NLRB 1236 (1950).

In the present case, the parties have stipulated that the following classifications are professional employees: Clinical Lab Scientist; Clinical Pharmacist; Dietician; Occupational Therapist; Physical Therapist; Social Worker BSW; Social Worker LCSW; Social Worker MSW; Speech Pathologist; Microbiology Coordinator; and Clinical Lab Coordinator.

It is undisputed that the CBA between the Employer and Intervenor, which expired on December 31, 2009, specifically included both professional and nonprofessional employees in a single bargaining unit. Further, the parties have stipulated that there is no contract bar that would preclude the processing of this petition. (*See Corporacion De Servicios Legales De Puerto Rico,* 289 NLRB 612 (1988) (where the Board held that an existing collective-bargaining agreement between the employer and intervenor constituted a contract bar to the election, rejecting the petitioner's argument that the contract cannot bar its petition to represent the employer's professional

employees as those professional employees never had the opportunity to vote for inclusion in a combined unit pursuant to Section 9(b)(1) of the Act.)

While the record is unclear as to how the professional and nonprofessional employees came to be included in a single bargaining unit,[27] no evidence has been adduced that the professional employees were provided an opportunity to vote for inclusion in such a combined unit with nonprofessional employees. Accordingly, because there is no contract bar and it appears that the professional employees were not previously afforded an opportunity to express their desire to be included in a unit with nonprofessionals, I find that the professional employees are entitled to a *Sonotone* election under Section 9(b)(1).

VI. CONCLUSION: On the basis of the foregoing and the record as a whole, I find that petitioned-for unit is an appropriate unit.[28] Further, I find that the seven disputed classifications are not supervisory within the meaning of the Act, as amended, and should be included in the bargaining unit. Finally, I find that the professional employees should have an opportunity to vote as to inclusion in the petitioned-for unit pursuant to Section 9(b)(1).

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting groups/units found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **NUHW or SEIU-UHW-West or neither**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

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[27] Although the Employer's attorney stated at the initial hearing that the Employer and Intervenor decided to combine the professional and nonprofessional units, no evidence was adduced concerning this position. *See supra* note 12.

[28] As previously noted, although the petitioned-for unit is an appropriate unit, the professional employees will vote as to their inclusion in the petitioned-for unit.

Voting Eligibility

Eligible to vote in the election are those in the voting groups/units who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit Lists of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office election eligibility lists, one list for each voting group/unit, containing the ***full*** names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The lists must be of

sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the lists should be alphabetized (overall or by department, etc.). These lists may initially be used by the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the lists available to all parties to the election.

To be timely filed, the lists must be received in the NLRB Region 31 Regional Office, 11150 W. Olympic Boulevard, Suite 700, Los Angeles, California 90064-1824, on or before **August 23, 2010**. No extension of time to file these lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file these lists. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The lists may be submitted to the Regional office by electronic filing through the Agency's website, **www.nlrb.gov**,[29] by mail, by hand or courier delivery, or by facsimile transmission at (310) 235-7420. The burden of establishing the timely filing and receipt of these lists will continue to be placed on the sending party. Since the lists will be made available to all parties to the election, please furnish a total of **two** copies, unless the lists are submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election.

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[29] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.

Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **August 30, 2010.** The request may be filed electronically through the Agency's web site, www.nlrb.gov,[30] but may not be filed by facsimile.

DATED at Los Angeles, California this 16th day of August, 2010.

James J. McDermott Regional Director
National Labor Relations Board
Region 31

[30] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.

FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OLYMPIA HEALTHCARE LLC d/b/a OLYMPIA MEDICAL CENTER Employer and NATIONAL UNION OF HEALTHCARE WORKERS Petitioner and SEIU-UNITED HEALTHCARE WORKERS-WEST Intervenor	Case No. 31-RC-8773 **DATE OF MAILING** August 16, 2010

AFFIDAVIT OF SERVICE OF: DECISION AND DIRECTION OF ELECTION (*Also Waiver Forms)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that, on the date indicated above, I served the above-entitled document(s) by postpaid certified mail upon the following persons, addressed to them at the following addresses:

Served by regular mail:

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Attn.: Trustees
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Oakland, CA 94612

Subscribed and sworn to before me this 16th day of August, 2010.	DESIGNATED AGENT Aida Caneteo **NATIONAL LABOR RELATIONS BOARD**